

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
on its own motion)	
)	
Northern Illinois Gas Company d/b/a NICOR)	Docket No. 01-0705
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	
Northern Illinois Gas Company d/b/a NICOR)	Docket No. 02-0067
Gas Company)	
)	
Proceeding to review Rider 4, Gas Cost, pursuant)	
to Section 9-244(c) of the Public Utilities Act)	(consolidated)
)	
Illinois Commerce Commission)	
on its own motion)	
)	
Northern Illinois Gas Company d/b/a NICOR)	Docket No. 02-0725
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	

**VERIFIED MOTION OF ENTERGY-KOCH TRADING, L.P. TO
EXTEND APPLICATION OF MODIFIED PROTECTIVE ORDER**

Entergy-Koch Trading, L.P. (“EKT”), by and through its undersigned attorneys who have made a special and limited appearance in this proceeding for the sole purpose of safeguarding EKT’s rights in connection with the production of documents and recordings, respectfully moves the Illinois Commerce Commission (“ICC” or

“Commission”) to extend and continue the application of the Modified Protective Order, a copy of which is attached as Exhibit A, for an additional five years.

On November 13, 2006, the Administrative Law Judges in this proceeding formally entered the Modified Protective Order (Ex. A) which was to expire five years following its entry. (*Id.* at 13, ¶20). The parties to this proceeding, through extensive and deliberate negotiations, developed a detailed Modified Protective Order that satisfied the parties and the ICC’s mutual concerns. It provided reasonable protection to EKT, and to the many individuals whose comments were written or recorded, while safeguarding the rights of the parties and the ICC to continue this proceeding, and the rights of government agencies to pursue any investigation they saw fit. Additional safeguards were agreed upon in the event any party disputed the confidentiality designation made by EKT.

EKT produced more than 45,000 pages of documents and nine compact discs containing audio recordings, and continued to work cooperatively with the parties in the ensuing months to respond to requests and produce additional materials. The Modified Protective Order worked just as intended. To EKT’s knowledge, no party has ever objected to a single confidentiality designation, nor suggested that the Modified Protective Order has in any way impeded the parties effort to continue with this proceeding.

The five year expiration date of the Modified Protective Order was requested and entered based on Commission rules, and on the belief that this proceeding likely would have concluded in that five year period. However, the ongoing nature of these and other related proceedings supports an extension of the Modified Protective Order, which has

proven to be workable and eminently reasonable for all parties, while providing a measure of protection for EKT and for the many individuals whose information and communications were produced by EKT.

In further support of its motion, EKT states as follows:

1. EKT is not a party to the instant proceeding.
2. On May 19, 2004, Nicor filed an Application with the Commission to issue a subpoena to EKT. On May 25, 2004, Nicor withdrew its original application and filed its Amended Subpoena Application.
3. On June 4, 2004, EKT filed a Special Limited Appearance and a Verified Objection to Nicor's Amended Subpoena Application.
4. On June 14, 2004, following the completion of briefing on EKT's objection, the Administrative Law Judges ("ALJs") granted Nicor's Amended Subpoena Application.
5. Following that June 14, 2004 order, there were extensive proceedings, primarily between EKT and Nicor, to resolve disputes concerning, *inter alia*, which court or forum had jurisdiction over EKT, whether Nicor had satisfied certain Commission standards concerning the requested subpoena, the scope of the subpoena, and EKT's concern that the voluminous production required by the subpoena was unduly burdensome and would compromise the confidentiality rights and concerns of EKT and the many individuals whose information or communications would be revealed by the requested production. Those proceedings took place in this Commission proceeding, in the Appellate Court of Illinois for the Second Appellate District (Case No. 2-04-1004), in the Circuit Court of Cook County, Illinois (Case No. 04 CH 8130), in a separate

proceeding Nicor filed against EKT also in the Circuit Court of Cook County (Case No. 04 CH 19444) and in the District Court of Harris County, Texas (where Nicor sought an order enforcing the subpoena that was the subject of the June 14, ruling, and later sought to issue a *subsequent* subpoena).

6. The materials requested by Nicor's subpoena contained confidential, non-public financial information, natural gas trading plans and techniques, contracts and contract negotiation information; market assessments and commentary, financial calculations and business costs, business practices, communications of an array of individuals – who also are not parties to this proceeding – and other records which contain confidential or sensitive information.

7. Throughout this proceeding, EKT sought to establish or agree upon a procedure for understanding and identifying the true scope of the required production of business, investment, strategic and individual/personnel data and information; securing the protection and confidentiality of EKT documents and procedures; establishing a mechanism to identify confidential materials and information; identifying the scope and limitations of that protection; and establishing a mechanism for the other parties to contest a confidentiality designation, while protecting EKT and the individuals implicated in any production until that dispute is resolved; and all while allowing the parties to continue with this proceeding and without limiting the ability of the governmental entity parties to fulfill their regulatory, investigative or prosecutorial functions that may be required of them.

8. Following the resolution of issues related to the subpoena in the Commission and in the courts of Illinois and Texas, EKT and the parties to this

proceeding – following extensive negotiations – collectively reached agreement on an agreed Modified Protective Order that was entered by the ALJs on November 13, 2006. (Ex. A). That Modified Protective Order, while providing reasonable protection for EKT and the individuals whose information and communications were to be produced in compliance with the subpoena, also ensured that such protection would not delay or interfere with this proceeding or with the rights or obligations of the parties to this proceeding. Thus, the Modified Protective Order provided a mechanism, *inter alia*, to

- I protect the right and ability of the Cook County States Attorney’s Office (“CCSAO”) and the Office of the Illinois Attorney General (“OAG”) to conduct investigations or use any of the materials beyond this proceeding, pursuant to their respective law enforcement obligations without notice to EKT or others, and to share the materials with other law enforcement agencies. (Ex. A at ¶ 6);
- ii. facilitate the parties’ cooperation and communication in an attempt to efficiently gather, produce additional categories of documents (*id.* ¶ 8);
- iii. allow for the transcribing and recording of conversations and the designation of certain limited portions of the transcripts as confidential (*id.* ¶ 9);
- iv. publically share or disseminate certain documents or information, to use information in connection with this Commission proceeding, and facilitate a mechanism to resolve concerns that some portion of those documents sought to be disseminated should remain confidential (*id.* ¶ 10);
- v. resolve any objections a party may have to an EKT confidentiality designation (*id.* ¶¶ 12, 13); and
- vi. recognize that EKT was not subjecting itself to the jurisdiction of the Commission for matters beyond the scope of the subpoena and protective order (*id.* ¶ 18).

9. There were, of course, numerous other provisions negotiated and agreed to between EKT and the parties, and entered as an order by the ALJs on November 13, 2006. (Ex. A).

10. On December 4, 2006, EKT produced to the Commission, in accordance with the Modified Protective Order, fifteen boxes containing approximately 42,000 pages of hard copy pages of documents, eight compact discs containing approximately 3,600 additional pages of documents, and nine additional compact discs containing audio recordings. (Ex. B).

11. In the weeks and months following that initial, substantial production, EKT continued to cooperate with the parties to this proceeding, responding to inquiries and producing additional materials.

12. Events since the Modified Protective Order was negotiated, executed and entered by the ALJs has demonstrated just how well it has worked. No one has challenged a single EKT confidentiality designation. To EKT's knowledge, no one has complained that the Modified Protective Order has disrupted any aspect of this Commission proceeding. No governmental entity has complained that the Modified Protective Order has hindered an investigation, regulatory proceeding, criminal prosecution or any other governmental function. In fact, no one has identified to EKT a single issue, concern, or adverse impact with any aspect of the Modified Protective Order.

13. In short, the Modified Protective Order has worked just as the parties had hoped, providing a measure of protection to EKT and the individuals identified in the materials produced, while ensuring that these proceedings continue unabated and giving the parties the right to use the EKT materials as may be needed in other governmental contexts. Plainly there will be no prejudice to the parties and no adverse impact on this proceeding, if the Modified Protective Order is extended.

14. In contrast, the justification behind EKT's request for the protection of the Modified Protective Order remains in effect. At the time the Modified Protective Order was entered, it was not contemplated that this Commission proceeding would continue for more than five years. In addition, after the Modified Protective Order was entered, another proceeding was initiated in the United States District Court for the Northern District of Illinois filed by the Securities and Exchange Commission, captioned as *SEC v. Fisher, et al.* Case No. 07 cv 4483) involving claims and issues that overlap with some of the matters raised by or against Nicor in *this* proceeding. That proceeding *also* remains pending, and EKT also is not a party to *SEC v Fisher*, but has a similar legitimate interest in protecting the confidentiality of its records without compromising the resolution of that case. Making public the EKT information regarding strategies, internal communications, marketing and individual communications of an array of individuals who also are not party to this proceeding would threaten their confidentiality rights without remotely advancing or benefitting the Commission proceedings or the parties to this proceeding.

15. Commission rules, moreover, support the granting of this motion. The Illinois Administrative Code provides, in pertinent part, as follows:

A person submitting a motion for protective order shall specify the proposed expiration date for the proprietary status of the data, information or studies. The proposed expiration date shall be no more than five years from the date of submission. **Notwithstanding the preceding sentence, however, the proposed expiration date may exceed five years upon a showing of good cause.** If no date is specified, the proposed expiration date for the proprietary status of the data, information or studies shall be two years from the date of submission.

83 Ill. Admin. Code § 200.430(b)) (emphasis added).

16. Thus, the Commission's regulations recognize that confidential information may remain undisclosed to the public forever. By this motion, however,

EKT simply requests the granting of an order identical to that previously entered in this proceeding – requiring the identical protection through the identical Modified Protective Order for another, identical, five year period.

17. As well, the Modified Protective Order contains provisions which could result in the public dissemination of certain records previously designated as confidential, if anyone believes such public dissemination of particular documents is warranted. The Modified Protective Order simply provides a mechanism to evaluate the propriety of public disclosure as against maintaining confidentiality protections currently in place. It strikes an eminently reasonable balance and should remain in effect.

18. The regulations, moreover, are consistent with the Public Utilities Act, which mandates that the Commission “shall” provide adequate protection to confidential information, and which sets no time limit on confidential treatment of information. (220 ILCS 5/4-404).

19. In short, the Modified Protective Order has caused no harm to any party or to the public, and no disruption to this Commission proceeding, while a public release of EKT confidential documents and recordings, at a time when this proceeding and the related SEC case remains ongoing, would harm EKT and the individuals whose communications are implicated, without remotely serving any interests of the Commission, of this proceeding, of any party or of the public.

WHEREFORE, for the foregoing reasons, Entergy-Koch Tracing, L.P., requests entry of an order extending by another five years – until November 13, 2017 – the effective date of the Modified Protective Order.

Respectfully submitted,

ENTERGY-KOCH TRADING, L.P.

By: /s/Christopher J. Townsend
One of its attorneys

Christopher J. Townsend
Kenneth L. Schmetterer
Christopher N. Skey
Michael R. Strong
DLA Piper LLP (US)
203 North LaSalle Street, Suite 1900
Chicago, Illinois 60601
(312) 368-4039
christopher.townsend@dlapiper.com
kenneth.schmetterer@dlapiper.com
christopher.skey@dlapiper.com
michael.strong@dlapiper.com

Dated: October 18, 2011

STATE OF ILLINOIS)
COUNTY OF COOK) SS

VERIFICATION

Christopher J. Townsend, being first duly sworn, on oath deposes and says that he is one of the attorneys for Entergy-Koch Trading, L.P., that he has read the above and foregoing document, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

Christopher J. Townsend

Subscribed and sworn to before
me this ____ day of October, 2011

Notary Public